FILE COPY.

BRIEF OF PLAINTIFFS IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 146

Office Supreme Court, U. S.
FILED.
NOV 22 1906
JAMES H. McKENNEY,
CLERK.

JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ANDRIEUS A. JONES PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

NEILL B. FIELD,
Albuquerque, N. M.,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 146

JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ADRIEUS A. JONES, PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This is a suit by Joseph M. Cunningham, Trustee, Ida May Jones and Andrieus A. Jones against Charles Springer and John B. Dawson to recover the reasonable value of services rendered by the plaintiff in error A. A. Jones, as an attorney at law, in the defense of a certain action of ejectment brought by the Maxwell Land Grant Company against J. B. Dawson in the district court of Colfax county, New Mexico.

Cunningham, as trustee, and Ida May Jones are made parties, because Ida May Jones, formerly the wife of A. A. Jones, is interested in the recovery under an agreement for the division of the community property of the spouses after divorce,

Cunningham being trustee under that agreement.

The complaint was in three counts. The first count alleged the employment of A. A. Jones, as an attorney at law, by the defendants in error, in and about the defense of certain litigations and suits at law brought and to be brought of and concerning a large tract of land in the county of Colfax, New Mexico, and an agreement on the part of his employers to pay the reasonable value of his services, which reasonable value was alleged to be seventy-five thousand dollars ($75,000.00), and that no part of said sum had been paid. The second count alleged that Springer and Dawson were justly indebted to plaintiffs in the sum of seventy-five thousand dollars ($75,000.00) for the labor, services, care and diligence of A. A. Jones as an attorney and counsellor at law by him before that time done, performed and bestowed in and about the business of the defendants at their request; a promise by the defendants to pay the said sum of seventy-five thousand dollars ($75,000.00), and a breach of that promise. The third count alleged that Dawson was the owner and claimant of a large tract of land in Colfax county of the value of five hundred thousand dollars ($500,000.00); that certain litigation and law suits of and concerning the land and the title thereto were commenced against Dawson by the Maxwell Land Grant Company, and thereupon Dawson made and entered into an agreement to convey, and thereafter did convey to Springer the one-half interest of all said valuable land as aforesaid, in consideration that Springer should pay all costs and expenses of carrying on and conducting to a final determination the defense of said claims to said valuable lands set up and made by said Maxwell Land Grant Company; that in pursuance of said agreement made between Dawson and Springer, Springer, on behalf of himself and Dawson, made an agreement with the plaintiff A. A. Jones, whereby Jones agreed to conduct and manage for the defendant the defense of said litigation, and for such services Jones was to receive a reasonable compensation; that Jones performed the services; that the same are rea-

sonably worth seventy-five thousand dollars ($75,000.00) and have not been paid for.

The defendants answered jointly and set up three defenses as follows:

> "1. Now come the defendants in the above entitled cause and for answer to the complaint of the plaintiffs therein deny each and every allegation in said complaint contained.
>
> "2. And for further answer to said complaint defendants say: That before the commencement of this action they paid the demand for the recovery of which this action is brought.
>
> "3. And for a further answer to said complaint defendants say that this action was not commenced within four years from the time the cause of action therein accrued." (*Transcript, page 7.*)

To the second and third paragraphs of the answer a reply was filed. Upon these issues the case was tried by a jury who returned a verdict for defendants in error. A motion for a new trial having been filed and overruled, the case was taken for review to the supreme court of the Territory, and the judgment of the district court having been there affirmed, this writ of error was sued out to review the judgment of affirmance.

The contract of employment rested entirely in parol, and there were no witnesses to it except A. A. Jones and Charles Springer. Jones' account of his employment by Springer may be summarized as follows:

> " . . That on the tenth day of October, 1891, he was engaged in the practice of law at Las Vegas, in the Territory of New Mexico", and on that day "the defendant, Charles Springer, came to his office and told him that the Maxwell Land Grant Company was going to bring, or had brought, a suit against John B. Dawson, for his ranch in Colfax county, and wanted him to represent Mr. Dawson in that litigation; that Jones acquiesced, and thereupon Springer wanted to know what fee would be charged and Jones said, I do not know what would be a right fee. I do not know anything about the case or how much work would be required or the value of the property involved, and said to Springer, you know more about that than I do. Whatever you think is right will be sat-

isfactory to me. Thereupon Springer asked Jones if five hundred dollars would be about right, and Jones replied, if you think that's fair, it will be satisfactory to me; that Jones did not know at that time that Charles Springer had any interest in the controversy and supposed that Springer was employing him to represent Mr. Dawson, and that Springer was a disinterested friend of both Dawson and himself; that Springer then said, well, we will fix the fee at five hundred dollars for the case in the district court and in the supreme court of the Territory, and Springer thereupon gave Jones a check for one hundred dollars on account of his fee; that nothing was said about the case in the supreme court of the United States or about a second trial or about a second appeal to the supreme court of the Territory;" . . (*Transcript* 28.)

Springer's account of the same transaction is:

" . . . after the suit was brought, witness (Springer) visited Las Vegas to employ counsel and determined to employ A. A. Jones if he could do so; that he was not personally acquainted with Mr. Jones, and was introduced to him on the day when he first spoke to him about the Dawson case, and told Mr. Jones something of the case; told him that the Maxwell Land Grant Company had brought a suit in ejectment against Mr. Dawson involving the title to his ranch in Colfax county; that he had an interest in the property and that he had to pay all the expenses of the litigation; that he had come to see if he could employ him; that Jones asked witness if he had employed or if he expected to employ anybody else; the witness told him he had not and had no intention of doing so; that he told Jones that the case would undoubtedly be bitterly fought by the Maxwell Land Grant Company and that they had, up to that time, never been defeated in a law suit; that the case would undoubtedly go to the Supreme Court of the United States and asked him what he would charge the witness to conduct the litigation; and Jones answered I am willing to leave the matter entirely to you; that witness then said, I would like to have settled what your charges will be and asked Jones to state what his charge would be, to which Jones replied that he did not care to do that; that the witness said how would a fee of five hundred dollars do, to which Jones replied that will be perfectly satisfactory and the witness said that is for the entire litigation; Mr. Jones after some hesitation said yes, I am satisfied with that; that witness told

> Jones that he had considerable other business, some of his own and some that he controlled, which would require the services of an attorney and that if he undertook the Dawson case, witness would give him such business as he had in that line and get whatever business for him that witness could get on the outside; witness also said that he would himself assist in the case in every way possible and would get up all maps and plats and surveys and generally hunt up all the evidence in the case; that Jones made no inquiry with reference to the authority of witness to employ him in the case and all that was said on that subject was that witness had an interest in the property and had to pay the expenses of the litigation;" . . . (*Transcript* 39.)

A number of lawyers were called by the respective parties to testify as to the reasonable value of Mr. Jones' services. The witnesses on behalf of plaintiffs fixed such value at from seventy-five thousand dollars ($75,000.00) to one hundred and twenty-five thousand dollars ($125,000.00), while the witnesses on behalf of defendants in error varied from two thousand dollars ($2,000.00) to forty thousand dollars ($40,000.00) in their estimate of the value. It is insisted that error was committed by the trial court in refusing to strike out some of the testimony of the witnesses for defendants in error on this point. The case of the witness Veeder, as well perhaps as any other, illustrates this point, and we here set forth all that is shown by the bill of exceptions with relation to his testimony:

> "John D. Veeder, witness on behalf of the defendants, was sworn and examined and his testimony tended to show that he is an attorney at law, forty-six years of age and resides in Las Vegas, where he commenced the practice of law in 1882, that from that time on he has resided in Las Vegas and practiced law throughout the Territory in the District Court of the Territory, in the Supreme Court of the Territory and in the court of private land claims in the Territory and Texas and in the United States Supreme Court; that he is acquainted with the decision of the Supreme Court of the Territory and the Supreme Court of the United States in the case of the

Maxwell Land Grant Company vs. John B. Dawson; that he had been present during the trial of this case and heard the testimony of the plaintiff, A. A. Jones, and has examined the record which was used in the Supreme Court of the Territory and also the record which was used in the Supreme Court of the United States, and copies of briefs used by both sides in those courts and from his knowledge of that case derived from sources mentioned, witness can give an opinion as to the value of the services of A. A. Jones therein, supposing that there was no counsel (contract) in existence, fixing the value of such services; assuming the area in dispute to be about twenty-three thousand acres, a fair and reasonable fee for the services of Mr. Jones in the ejectment suit would be the sum of not more than five thousand dollars which should include all traveling expenses in connection with the case.

"On cross-examination the testimony of the witness tended to show that he had assumed what he described as a middle ground on the value of the property in controversy in the ejectment suit, but he did not disclose to the jury and was not asked to disclose to the jury what he meant by taking a middle ground on the value of the property in controversy nor what value he assumed for the property in making his estimate as to the value of Mr. Jones' services.

"The plaintiffs, by counsel, moved the court to strike out so much of the testimony of the witness, John D. Veeder, as expressed his opinion as to the value of the legal services of the plaintiff, A. A. Jones, in the case of the Maxwell Land Grant Company vs. John B. Dawson, because it affirmatively appears from the testimony of the witness that his opinion as to the value of the services of A. A. Jones is based upon an assumption as to the value of the land in controversy in that suit, which assumption of value is not disclosed to the jury and is not based upon the evidence in the case; but the court overruled the said motion to which the plaintiffs then and there excepted and still except." (*Transcript, pages* 43-44.)

The supreme court of New Mexico in passing on these questions evidently misapprehended our contention, and there is more than an intimation in the opinion of that court that the bill of exceptions was inadequate properly to present them.

but we submit that, properly understood, the errors are fully disclosed by the record. We made and make no objection to the form of question propounded to these expert witnesses. Our contention is, that when it appeared on cross-examination that a witness testifying as an expert was withholding from the jury facts which materially influenced his opinion, such opinion at once became inadmissible, and that we had a right to move to have it stricken out, and we were not bound to go on and make his opinion competent by causing him to disclose to the jury what had not been disclosed on direct examination.

At the close of the evidence the court gave to the jury a charge in sixteen paragraphs, to only one of which (Paragraph 13) was exception taken. Paragraph 13 is as follows:

> "In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants." (*Transcript, page* 65.)

And the exception taken thereto is as follows:

> "To the action of the court in giving to the jury the propositions contained in paragraph 13 of the foregoing charge, the plaintiffs by their counsel, then and there objected, for the reason that the court therein fails to tell the jury what are the material facts in the case, and leaves to the determination of the jury the question of the materiality of each and every fact in evidence, and because it erroneously assumes that the defense of payment set up in the answer involves a single fact and not several facts, and fails to tell the jury that on the issue of payment made by the pleadings, it devolves upon the defendants to show by a preponderance of the evidence that there was an agreement on the part of the plaintiff, A. A. Jones, to perform the services performed by him in the ejectment suit for a fixed sum, to-wit, five hundred dol-

lars, and that said sum of five hundred dollars had been paid prior to the institution of the suit, in order to maintain the plea of payment; and because it fails to tell the jury that there is no evidence from which they would be authorized to find that the defendants had, prior to the institution of the suit, paid to the plaintiffs or any of them the reasonable value of the services rendered by A. A. Jones in the said ejectment suit, but the court overruled the said objection, and gave the said charge, notwithstanding the said objection, to which action of the court the plaintiffs then and there excepted and still except." (*Transcript, page* 66.)

Before the argument was concluded the trial judge attempted to modify the 13th paragraph of the charge to meet this objection, and if such modification had been effectually made the objection would have been fully met. The supreme court of New Mexico held that the modification was effectually made, and also that the charge as originally given was correct. It is urged that the modification was not effectually made and that this fully appears from the bill of exceptions, the opinion of the suprem court of New Mexico to the contrary notwithstanding. The bill of exceptions recites:

"And thereafter the argument of counsel to the jury proceeded, and after the argument of one counsel on behalf of the plaintiffs and of both counsel on behalf of the defendants had been concluded, and before the beginning of the closing argument by Mr. Field on behalf of the plaintiffs, the court said to the jury:

" 'Gentlemen of the Jury:

" 'In the thirteenth instruction given you by the court in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact*, in the second line and inserting in lieu thereof, the word *issue;* and also in the same line the word *fact* and insert in lieu the word *issue*, and in the fifth line strike out the words *material fact* and put in the word *issue*.

" 'So the instruction will read, gentlemen, as follows:

" 'In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to

entitle the plaintiffs to recover in this case they must establish every such issue with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover and you should find for the defendants.

"'Now, gentlemen, I will withdraw instruction No. 13 given to you before and insert and give this amended instruction instead.'

"The court read the foregoing amended instruction from a carbon copy of the original charge in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, Mr. Field, of counsel for plaintiff, said to the court:

"(Mr. Field to Court): As thus modified, I think the charge is absolutely without objection, if the court please.

"The amendment of the thirteenth instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned." (*Transcript, page 69.*)

The statutes of New Mexico require the charge of the court to be in writing, and that the charge shall be taken by the jury to the jury room when they retire to consult as to their verdict. Notwithstanding all that is said in the opinion of the supreme court of New Mexico on this point, we think it a demonstrable proposition that there is reversible error in this action of the trial court, unless paragraph thirteen of the charge as originally given was not open to the objection which was made to it. Two instructions were refused by the court, and the refusal was sustained by the supreme court of the Territory on the ground that they were fully covered by the charge. We think they were not covered by the charge, and that they were essential to a proper understanding of the case by the jury.

The plaintiffs in error have filed the following assignment of errors:

I.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, John D. W. Veeder, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

II.

The district court erred in refusing to withdraw from the consideration of the jury the opinion of the witness, R. E. Twitchell, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

III.

The district court erred in refusing to withdraw from from the consideration of the jury the opinion of the witness, Jeremiah Leahy, as to the value of the services of A. A. Jones, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IV.

The district court erred in refusing to withdraw from the consideration of the jury so much of the testimony of the witness, R. E. Twitchell, as relates to his opinion as to the volue of coal lands in New Mexico, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

V.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company vs. John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all

the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You can not be expected to attend to this business for any five hundred dollars; go on with the case, and we will see how we come out, and after it is all over you will be paid what is right', or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case;" and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VI.

The district court erred in refusing to give to the jury an instruction asked by plaintiffs, as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly." and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VII.

The district court erred in giving to the jury paragraph 13 of the court's charge, as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case, they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover and

you should find for the defendants";
and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

VIII.

The district court erred in giving to the jury an oral modification of said paragraph 13, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

IX.

The district court erred in failing to modify in writing the original charge as read to the jury, in accordance with the oral modification attempted to be made by the court, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

X.

The district court erred in giving to the jury a charge a part of which was not in writing, within the meaning of the requirement of the statutes of this Territory, and the supreme court of the Territory of New Mexico erred in affirming the action of the said district court in that behalf.

XI.

The supreme court of the Territory of New Mexico erred in affirming the judgment of the district court"

POINTS AND AUTHORITIES.

I.

THE OPINIONS OF THE WITNESSES, VEEDER, TWITCHELL AND LEAHY, AS TO THE VALUE OF JONES' SERVICES SHOULD HAVE BEEN WITHDRAWN FROM THE JURY.

As to these alleged errors, the supreme court New Mexico said in its opinion:

"There is no room for doubt that the jury found in

favor of the defendants in error upon the ground that there was a special contract, by which Jones agreed to accept five hundred dollars in full of all his services in the Dawson case; that there had not been a modification of the agreement, and that Springer had paid Jones in full. This is conclusively shown in the fact that the lowest value fixed by Jones' services, in the absence of contract, by the witnesses on either side, was two thousand dollars, the highest being more than one hundred thousand dollars, and if the jury had found that there was no contract limiting Jones to the sum of five hundred dollars, and that the value of his services was provable, they could not have rendered the verdict they returned.

"Whether or not there was a contract limiting Jones to a fee of five hundred dollars, was the first question for the jury to determine, and having found that there was such contract, all testimony as to the value of Jones' services and the value of the land involved in the Dawson suit became immaterial and not for the consideration of the jury. A ruling as to the admission or rejection of such evidence, in the face of the verdict of the jury would not constitute error, regardless of its character.

"Where the subject matter of an exception becomes immaterial in the progress of the cause, it cannot be assigned as error, even though the ruling was erroneous. (Citing authorities.)

"We do not wish to be understood as holding that the court committed error in the ruling upon this evidence in the court below, on the contrary, in our opinion, the rulings are sustained by the weight of authority, but, as the issue upon which this testimony was received, became wholly immaterial by the verdict of the jury, no prejudice could result to the plaintiffs in error, and error if committed, would be harmless.

* * * * * *

"Counsel for plaintiffs in error moved the court to strike out that portion of the testimony of witnesses Twitchell, Veeder and Leahy, relative to the value of the property, upon the ground, that the testimony of such witnesses is based on an assumed value, and that this assumption is not based upon the evidence nor was it disclosed to the jury. The synopsis of the testimony in chief shows, that all of these witnesses testified that they were familiar with the decisions rendered in the Dawson case, both in the Territorial Courts and Supreme Court of the

United States; that they had examined the record and proceedings in the case, and that they could express an opinion as to the value of Jones' services, in the absence of contract. The record of the proceedings in the Dawson case was introduced in evidence. It would appear from this, that their testimony was based upon the testimony in the case as to the value of Jones' services. Counsel in their brief state that the hypothetical question propounded on behalf of the defendants in error, to these witnesses, omitted the element of value of the property in the Dawson suit. The transcript has not brought into this court the hypothetical questions propounded in the court below, to these witnesses, and counsel's synopsis of the testimony in chief does not include these questions. In the absence of the questions which the court has a right to examine in determining their contents we must assume that the questions were properly framed. This objection is urged especially as to the testimony of Mr. Twitchell, but Mr. Twitchell testified 'My entire testimony has been given on the assumptions provided in the questions made to me by Mr. Spiess.' That there were hypothetical questions propounded to these witnesses, is not questioned, it is only objected that one element, which counsel for plaintiffs in error deems essential, was omitted. This court cannot assume the correctness of counsel's contention as to this omission, inasmuch as the hypothetical questions are not before the court." (*Transcript*, 97-99.)

As to the first of these propositions we submit, that so far from this evidence being immaterial in any aspect of the case, the verdict of the jury demonstrates that it was of the utmost importance, because without a clear idea as to the reasonable value of Jones' services, the jury could not properly weigh the evidence of Springer as to what he claimed was the contract, and therefore illegal evidence—opinions such as those of which we complain—was peculiarly calculated to mislead the jury, to the manifest disadvantage of the plaintiffs in error. There is no logic in the contention that all evidence as to the value of Mr. Jones' services became immaterial whenever the jury found that Mr. Springer's version of the contract was correct, because without a due appreciation of the value of

those services, the jury could not intelligently pass upon the probable truth of Springer's testimony. A vast number of adjudicated cases support the proposition that where there is a dispute as to the terms of an alleged contract, such as we have in the present case, evidence of the value of the subject matter of the contract is admissible as tending to show that such a contract was or was not probably entered into. A few of the many cases in which the point has been directly ruled are the following:

Barney vs. Fuller, 30 *N. E.*, 1008.
Flagg vs. Reilly et al., 48 *N. Y. Supp.*, 544.
Whitney Co. vs. Stevenson, 45 *N. Y. Supp.*, 552.
Walker vs. Johnson, 46 *N. Y. Supp.*, 864.
Allison vs. Horning, 22 *Ohio St.*, 146.
Swain vs. Cheney, 41 *N. H.*, 232.
Roberts vs. Roberts, 91 *Iowa*, 231.
Paddleford et al., vs. Cook, 74 *Iowa*, 433.
Johnson vs. Harder et al., 45 *Iowa*, 677.
Kidder vs. Smith, 34 *Vt.*, 291.
Bradbury vs. Dwight, 44 *Mass.*, 31.
Baxter vs. Wales, 12 *Mass.*, 365.
Leland vs. Stone, 10 *Mass.*, 459.

It is, also, a well recognized principle that the contract price and the value of property or services may be so variant that the mere disparity will raise a presumption of fraud, and while mere inadequacy of price is not ordinarily sufficient to defeat the enforcement of contracts at law if their existence be clearly established, yet a glaring inadequacy of price affords strong presumptive evidence that the contract if oral was never entered into, and if written was obtained by circumvention and fraud. *Hume vs. U. S.*, 132 *U. S.*, 414-415. Therefore, the jury could not properly at any time discard from consideration the reasonable value of Mr. Jones' services, even while attempting to arrive at a conclusion as to whether there was a special contract for five hundred dollars

($500.00). Were the plaintiffs in error prejudiced by the admission of the opinions of which we complain? There were two classes of expert witnesses introduced on behalf of defendants in error. One class testified that in their opinion the value of the property involved in the ejectment case was not material in determining the value of Mr. Jones' services. Their testimony was allowed to go to the jury without objection. Another class, including those of which we complain, testified that in their opinion the value of the property in controversy in the ejectment suit was material in determining the value of Mr. Jones' services, and that each had assumed in his own mind some value for such property, but they did not disclose, and were not asked to disclose to the jury what that value was. As to these latter, we say that the only theory upon which the action of the trial court can be sustained is, as it seems to us, that this court shall hold that we ought to have gone on and ascertained by further cross-examination of these witnesses, what assumptions they were making which were not disclosed, and thus have rendered competent their opinions. However plausible such a theory may appear at first blush, it will be found upon careful examination to be fallacious. Take the case of the witness Veeder, (set out in full in the statement in this brief), and the record shows that at the close of the cross-examination a motion to strike out was made upon the ground that, "it affirmatively appears from the testimony of the witness that his opinion as to the value of the services of A. A. Jones is based upon an assumption as to the value of the land in controversy in that suit, which assumption of value is not disclosed to the jury, *and is not based upon the evidence in the case.*" Why was it not incumbent on the parties offering this witness as an expert to ascertain from him these material matters which he was concealing from the jury? Certainly not because they were not in as good position as we were to do so. No adjudicated case has been found in which this exact point has been ruled, but we submit that we performed our full duty to the court and to the witness when we devel-

oped the fact that he was concealing from the jury something upon which he was basing his opinion, and that it is no answer to say that we might have made his opinion competent by further cross-examination. Upon the record as made, fundamental rules governing the reception of expert testimony were violated. It is unnecessary to a proper review of these rulings that we should have brought into the supreme court of New Mexico, or into this court the hypothetical questions propounded to these witnesses. We made, and we make, no objection to the form of those hypothetical questions, but we insist that we demonstrated upon cross-examination that the answers of the witnesses were not based entirely upon the hypothetical questions.

Rog. Exp. Test., 70.
Robb vs. Carpenter, 187 *U. S.*, 161.
Hitchcock vs. Burgett, 38 *Mich.*, 507.
Kempsey vs. McGinnis, 21 *Mich.*, 137.
Burns vs. Barnfield, 84 *Ind.*, 48.

II.

PARAGRAPH 13 OF THE CHARGE OF THE COURT WAS CLEARLY ERRONEOUS.

The court charged the jury in paragraph 13 as follows:

> "In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you should find for the defendants." (*Transcript*, 65.)

To this paragraph of the charge objection was made,

> "* * * for the reason that the court therein fails to tell the jury what are the material facts in the case, and leaves to the determination of the jury the question of the materiality of each and every fact in evidence, and because it erroneously assumes that the defense of payment set up

in the answer involves a single fact and not several facts, and fails to tell the jury that on the issue of payment made by the pleadings, it devolves upon the defendants to show by a preponderance of the evidence that there was an agreement on the part of the plaintiff, A. A. Jones, to perform the services performed by him in the ejectment suit for a fixed sum, to-wit, five hundred dollars, and that said sum of five hundred dollars had been paid prior to the institution of the suit, in order to maintain the plea of payment; and because it fails to tell the jury that there is no evidence from which they would be authorized to find that the defendants had, prior to the institution of the suit, paid to the plaintiffs or any of them the reasonable value of the services rendered by A. A. Jones in the said ejectment suit." * * (*Transcript*, 66.)

Notwithstanding this objection, the court gave the charge as above quoted, and it was not until after all of the arguments, except the closing argument for plaintiffs in error, that an attempt was made to modify it.

It would seem that the fact that such an atempt was made at the time stated, sufficiently establishes that the trial judge was dissatisfied with the form of it, and was convinced that it was open to the objection made to it. At all events, there was an attempted modification, which was not accomplished, because the modification was not in writing, as required by the statutes of the Territory.

Paragraph 13 was, in the highest degree, misleading to the jury, because the jury were told that the burden of proof was on the plaintiffs to establish every material fact, except the fact of payment. There were, in truth, but two matters which were the subject of serious controversy between the parties. There was no dispute that Jones had been employed, or that he had rendered valuable services, or that those services had been accepted by the defendants in error. Neither was there any controversy as to the fact that Springer had paid Jones five hundred dollars. It was not even contended, by defendants in error, that five hundred dollars was the reasonable value of the services rendered; indeed, their own witnesses tes-

tified that the services were reasonably worth many times five hundred dollars. The reasonable value of the services was of course controverted, but the crucial fact in the case was the existence or non-existence of the agreement testified to by witness Springer. To maintain the defense of payment, it devolved upon defendants in error to establish by a preponderance of the evidence not the "fact of payment" as stated in this instruction, but every fact, the existence of which was involved in the issue of payment, the most important one of which was the existence of the special agreement relied on. The trial judge clearly stated the issue of payment in the third paragraph of his charge to the jury, as follows:

> "The defendants claim that Mr. Jones was employed to defend the said suit under a specific contract by which he agreed to give his services throughout the entire litigation in said suit for the sum of five hundred dollars; that said sum of five hundred dollars was fully paid before the commencement of this action." (*Transcript*, 63.)

Under this paragraph, was not the existence or non-existence of this special contract a material fact in the case? If the jury were unable, from the evidence, to say whether or not such a contract was made, what was their duty? Was it not clearly to decide that no such contract was made?

The plaintiffs in error sought to recover as upon a *quantum meruit* the reasonable value of the services of Jones; the defendants in error by their answer allege that they had, prior to the institution of the suit, paid Jones for those services. They did not plead the special five hundred dollar contract, as perhaps in strictness they ought to have done, but they sought to show by evidence in support of their plea of payment, that there was such a contract. Proof of the payment of five hundred dollars, without proof of the special contract relied on, would not maintain the plea of payment. The whole defense of payment rested upon the existence of the contract testified to by the witness Springer. This instruction, however, put upon plaintiffs in error the burden of proving that there was no such contract.

The objection taken by plaintiffs in error to this paragraph of the charge at the time it was delivered, called this matter directly to the attention of the trial judge. We asked him to specify what were the material facts which the plaintiffs in error were called upon to establish by a preponderance of the evidence. If that had been done, he must have told the jury that, if the plaintiffs in error proved the performance of the services, acceptance by the defendants in error, the reasonable value of the services, and the amount paid by the defendants in error on account thereof, they made a case entitling them to recover the reasonable value of the services, less the amount paid, unless the defendants in error, by a preponderance of the evidence, established the contract testified to by Springer, and that the agreed price had been paid.

If you eliminate from this case all evidence as to the existence or non-existence of the special contract for five hundred dollars testified to by the witness Springer, you thereby eliminate the defense of payment as completely as the same result could be accomplished by eliminating all evidence of the payment of money by Springer to Jones. It is true that the plea of payment does not, in the action of assumpsit upon a *quantum meruit*, admit that the services are worth the amount alleged in the declaration, but it does cast upon the defendant the burden of showing that he has paid all the plaintiff is justly entitled to receive. If that is not the legal effect of the plea, it must follow that a plea by the defendant that he has paid less than the plaintiff is entitled to receive, will bar the plaintiff's recovery.

The defendants in error in this case assumed the burden of showing, under their plea of payment, that they had paid for the services of Jones all that he was entitled to receive therefor.

Under the issue as made up in this case they could show this in either of two ways: First, by showing a special contract for an agreed price, and the payment of that price; or second, by showing that they had paid the reasonable value of the ser-

vices rendered. In either event it was incumbent upon them to show affirmatively all the facts necessary to establish their plea, and that too, by a preponderance of the evidence.

Refusing assent to this contention, the supreme court of New Mexico said:

> "Error is assigned upon the giving of instruction 13 in the original form, in the use of the word *fact* instead of the word *issue*, as used in the modified form which counsel concede to be a correct statement of the law. This assignment is made upon the theory that the court did not properly modify the charge. We cannot concede the correctness of the position of counsel for plaintiffs in error, even if the modification was ineffectual. While the word *issue* may, in many instances, be more comprehensive than the word *fact*, under the pleadings in this case there is no such difference as would be prejudicial to plaintiffs in error, and constitute reversible error. The original instruction was:
>
> "'In this case the burden of proof is upon plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such material fact with the exception aforesaid by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.'
>
> "If the plea of payment had been the sale plea, there would be force in the contention of plaintiffs in error. Being an affirmative defense, the plaintiffs' case would have been confessed, and the onus would be upon the defendants in error to avoid the effect of this by proving payment in full. Or, if the defendants in error had also pleaded a general denial, but before trial had withdrawn it electing to stand upon the plea of payment, the defendants would then have assumed the affirmative, and the burden of proof being cast upon them, would have been entitled to have opened and closed the case.
>
> * * * * * *
>
> "But the plea of payment, pleaded as it was after a general denial, could not under any circumstances cast upon the defendants in error the burden except as to the *fact*

of payment as stated in the original instruction 13.

"Counsel for plaintiffs in error, in their brief, contending that the burden was cast upon the defendants in error under the plea of payment, insist that, 'under the issue as made up in this case they could show this in either of two ways: First, by showing a special contract for an agreed price, and the payment of that price; or Second by showing that they had paid the reasonable value of the services rendered. In either event it was incumbent upon them to show affirmatively all the facts necessary to establish their plea, and that too, by a preponderance of the evidence.'

"We do not so understand the law, unless the plea of payment was pleaded alone, or in the absence of a general denial. Plaintiffs in error assert that the burden of proof was on the defendants in error to show 'a special contract for an agreed price, and the payment of that price.' But under the general issue the burden was on the plaintiffs in error to prove the contract alleged and the amount due under it, the single fact of payment being left to the defendants in error, if, indeed, that was required of them. Therefore, this instruction was not prejudicial to the plaintiffs in error even in its original form and ought not to work a reversal of the cause." (*Transcript*, 94-95-96.)

The authorities cited and commented on by the court in this part of its opinion do not appear to be open to the interpretation given them, and, indeed, no case, so far as our investigation has gone, holds that a plea of payment ceases to be a plea of payment because pleaded in connection with a general denial. The court appears to overlook the fact that our complaint is not that the charge put the burden of proof on the plaintiffs in error as to all of the issues except the issue of payment. We concede that as to every other issue than that of payment, the burden of proof was on us, and the jury were so told. It was, however, the defendants in error who relied upon the special contract, and evidence of the existence of the special contract would not have been admissible under a general denial.

Register Printing Co. vs. Willis, 57 *Minn.*, 95.
Lautenschlager vs. Hunter, 22 *Minn.*, 268.

"The plaintiff declared on the common counts for work and labor done and for legal services performed by the plaintiff for the defendant. The defendant filed four pleas, all of which, except the second, are in denial of the plaintiff's cause of action, and amount to the general issue. The second plea is a plea of payment. There are only three assignments of error in the record. The first is to the giving of the written charge No. 1 requested by appellee (plaintiff in the court below). The other two are the refusal of the court to give the second and fourth written charges requested by appellant.

"The charge given at the instance of the appellee to which exception was reserved correctly states the law, both as to implied promise to pay a fair and reasonable compensation for services performed, as well as to the burden of proof. It is a well settled proposition of law in this state that where, in the absence of an express contract, valuable services are rendered by one person to another, which are knowingly accepted, the law will imply a promise to pay a fair and reasonable compensation for such services. *Hood vs. League*, 102 *Ala.*, 228, 14 *South.* 572; *Wood vs. Brewer*, 66 *Ala.*, 570. The appellee claimed nothing under a special contract, but relied on the common counts for legal services rendered and work and labor done. After he had made out a *prima facie* case under the evidence, and rested his case, the defendant sought to show a special contract between himself and the plaintiff, and payment under such contract. There was no attempt on the part of the defendant to show payment, except under the special contract which he set up in his evidence. That the burden of proof was on him, under the plea of payment, is beyond controversy (*Shulman vs. Brantley*, 50 *Ala.*, 81); and, if he could only show payment by setting up a special contract, the burden of proof was equally upon him to show such contract. He sought to overcome the *prima facie* case of the plaintiff by showing an independent fact, the existence of which he affirms, and the law casts upon him the burden of proving it when it is disputed."

McFarland vs. Dawson, 29 *So.* 328 (*Ala*).

To the same effect are the following cases:

Robinson vs. Parrish, 62 *Ill.*, 131.

Sanns vs. Neal, 38 *N. E.*, 882, (*Ohio*).

Skillings vs. Norris, 50 *Me.*, 72.
Pendleton vs. Cline, 85 *Cal.*, 142.

III.

THE ATTEMPTED MODIFICATION OF PARAGRAPH 13 WAS NOT IN WRITING, AND THIS ERROR WAS NEITHER INVITED NOR WAIVED.

The statutes of the Territory require that all instructions shall be in writing. All of our statutes on this subject are here set out:

"Sec. 2992. Upon the trial of any cause either civil or criminal in the district courts held within and for the various counties of the territory, all instructions to the jury asked by either party, whether given or refused, shall be in writing, and all instructions given by the court at the request of either party or upon its own motion shall be in writing; and it is hereby made the duty of the court in all cases, whether civil or criminal, to instruct the jury as to the law of the case, and a failure or refusal so to do shall be sufficient ground for a reversal of the judgment by the supreme court upon appeal or writ of error; Provided, however, That the parties to the suit or their attorneys may waive upon the record the instructions in writing.

"Sec. 2994. Before the argument is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked and the charge of the court shall be in writing. The court shall instruct the jury as to the law of the case, but shall not comment upon the weight of the evidence.

"Sec. 2995. If the court refuse a written instruction, as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as, Changed thus, which words shall themselves indicate that the same was refused as demanded.

"Sec. 2996. The court must read to the jury all the instructions it intends to give and none others, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused,

and must write the words ,Given, or, Refused, as the case may be, on the margin of each instruction.

"Sec. 2997. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

"Sec. 2998. After the argument the court may also, of its own motion, charge the jury. Such charge shall be in writing in consecutively numbered paragraphs, and no oral explanation thereof shall be allowed; and the provisions of this section shall also apply to the instructions asked by the parties.

"Sec. 3002. When the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause the instructions of the court, and any instruments of writing admitted as evidence, except depositions.

"Sec. 2685. Sub-sec. 119. Whenever a ruling is made upon objections to the admission or rejection of testimony, or in the case of any other ruling or acts during the progress of a trial before a court or referee, or any ruling or decision at any time during the progress of a cause, it shall not be necessary to take any exception, but a review thereof may be had as if such exception had been taken and noted; and it shall not be necessary to object or except to the giving or refusal to give instructions to a jury in order to secure a review of the same on writ of error or appeal, but such instructions shall be reviewed in the same manner as if such instructions had been specifically excepted to at the time of giving or refusal to give same.

"Sec. 2685. Sub-sec. 128. When the evidence is concluded, and before the cause is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause which shall be in writing and shall be given or refused. The court may, of its own motion, give like instructions in writing, and all instructions shall be given by the court before argument and shall be carried by the jury to their room for their guidance to a correct verdict according to the law and the evidence." *C. L.* 1897.

The bill of exceptions recites that the court read the amended instructions from a carbon copy of the original charge in which certain words were stricken out, or crossed out with a

pencil, and other words were inserted with a pencil, and that after the amended instruction was read to the jury, counsel said to the court, "As thus modified, I think the charge is absolutely without objection, if the court please." Passing upon this objection, the supreme court of New Mexico said:

> "The modification made by the court in paragraph No. 13, as originally given, was to substitute in writing the word 'issue' for the word 'fact' or 'material fact.' This modification was made in conformity to the views of counsel for plaintiffs in error. There was no objection made to the method of modification, nor to its being read to the jury from a carbon copy. On the contrary, after all this was done, counsel for plaintiffs in error said, 'As thus modified, I think the charge is absolutely without objection.'
>
> "These proceedings took place in open court, and prior to the closing arguments in behalf of plaintiffs in error so as to enable counsel to present the cause to the jury upon the modified instruction. It is difficult to understand, therefore, how the jury could have been deceived or misled in that regard to the prejudice of plaintiffs in error. Counsel allege as error, that the modified instruction was not taken to the jury room, by the jury. The record does not seem to warrant this assignment. The record does not affirmatively show that any of the instructions were taken by the jury to their room, and yet, the instruction was modified, read to the jury, and the court had notified the jury that the original No. 13 had been withdrawn, before the jury retired. If counsel base this assignment upon the record statement as to what the stenographer did, it is clearly insufficient. The statement is, 'The amendment to the 13th instruction by the court to the jury, as thus made was also taken down by the court stenographer and transcribed by said court stenographer from his notes of the proceedings of the trial, and attached to the original charge on file, after the verdict of the jury had been returned.' The substance of the statements is, that the stenographer took down the court's modification, and having transcribed his notes of paragraph 13, as modified attached the same to the charge of the court on file, after the verdict had been rendered. But the record shows that the Chief Justice made the modification desired upon a carbon copy of the original paragraph 13 and read the

same to the jury. It is true the record is silent as to the actual handing of the charge, or any part of it to the jury, but it will be presumed that, that which should have been done, was done, in the absence of proof to the contrary or objection upon that ground. The stenographer may have done as stated, and yet, the charge and the modified carbon copy which had been substituted for the original paragraph 13, may have been before the jury while they were deliberating upon their verdict. The court seems to have done all in his power to correct paragraph 13 in accordance with the views of counsel for plaintiff in error, and to the method adopted, that the original paragraph was withdrawn and the amended one given then there was no objection at the time. If the court did not actually take the original paragraph from the jury, upon giving them the modified substitute, so that both were before them, it is inconceivable that the jury would be deceived or misled as to which they should consider. The phrase 'original charge on file' to which the stenographer attached his transcript, does not necessarily mean paragraph 13, as it may, and apparently does refer to the entire charge of the court. Taking the position that paragraph 13 was not modified and was not before the jury, counsel for plaintiff in errer make three assignments of error upon it: No. 9, that it was an oral modification, No. 10, that the original paragraph was not modified in writing as attempted, and No. 11, that part of the charge was not in writing. In our opinion these assignments are not well taken for the reasons above stated." (*Transcript*, 92-93.)

The opinion further suggests by implication that plaintiffs in error invited the trial judge to modify a carbon copy of the charge, or was aware that the modified instruction was read from a carbon copy of the charge, or that objection should have been made at the time that the carbon copy was used, although there is nothing in the record to justify a suspicion that counsel knew that a carbon copy was being used, and it is gravely said, "It would seem to be a dangerous precedent to hold that a new trial should be granted or reversal had, where the jury through carelessness, inadvertence or otherwise, fails to take the court's instructions with them after the same have been read to them." (*Transcript*, 93-94). Yielding to the

supreme court of New Mexico the profound respect which is its due, counsel feels constrained to protest that error is not assigned upon anything which the trial court was induced by counsel to do, and that there is nothing in this record which justifies the suggestion that counsel, in the supreme court of New Mexico, sought a reversal of the action of the trial court as to any action which was invited or waived on the trial. Certainly, when the Chief Justice told the jury that he had concluded to modify his previous instruction, "So the instruction will read, gentlemen, as follows," there was no reason why counsel should examine the paper which the Chief Justice held in his hand, on pain of being held to have waived the error if it afterwards turned out, as it does in this case, that it was not the instruction, but a carbon copy which was modified, as indicated. The verdict was rendered on November 30th, 1901. The motion for new trial was filed on December 4th, following, the bill of exceptions was not signed until September 2nd, 1903, and it affirmatively appears by this record that the "original charge on file" had not been modified when the bill of exceptions was signed. Therefore, we say that part of the charge was not in writing within the meaning of the territorial statute. We say further that we did not invite the judge to give any part of the charge not in writing, and we did not waive his failure to reduce his charge to writing. It appears inferentially from the bill of exceptions, that the Chief Justice had in his possession a carbon copy of the charge, and that he made certain erasures and interlineations thereon, but that carbon copy has never yet been made a part of the record in this case, and, of course, it was not delivered to the jury and could not properly have been delivered to the jury until it had been placed on file and become a part of the record. All that is recited in the bill of exceptions with reference to the action of the trial judge in modifying the carbon copy, and of the court stenographer in taking down and transcribing, after the verdict, the modification, merely show an intention on the

part of the Chief Justice to modify paragraph 13, and that such modification was not effectually made.

The carbon copy of the charge mentioned in the bill of exceptions can be considered in no other light than as a mere private memorandum of the judge. To concede that it fixes the character of the modification intended to be made, with the same degree of certainty that would have been accomplished if the judge had marked a paragraph in a printed book and had read from that paragraph to the jury, is to concede to it all the force which can fairly be claimed for it; indeed, it would seem that such a private memorandum retained by the judge in his own possession, is of much less stability for purposes of identification than a marked paragraph in a printed book would be. Yet, this court has held, in a case which came from the Territory of Utah, that marking a paragraph in a printed book was not in sufficient compliace with the statute of Utah, which is substantially like ours. It is said that the record does not show whether or not the jury took the original charge or the carbon copy when they retired, but the presumption is invoked that what the law required to be done was done. To the latter we agree, and we therefore insist that as the charge was not modified in writing and the carbon copy was not placed on file, it does appear that this carbon copy was not before the jury, but must have remained in possession of the judge, and that the "original charge on file" was the only "charge" which the jury had or could properly have had with them in the jury room during their deliberations.

Hopt vs. The People, 104 *U. S.*, 634.
New Albany Woollen Mills vs. Meyers, 43 *Mo. App.* 128.
Territory vs. Perea, 1 *N. M.*, 627.
Territory vs. Lopez, 3 *N. M.*, 156.
L. & N. R. Co. vs. Johnson, 81 *Fed. Rep.*, 679.

IV.

THE REFUSAL OF INSTRUCTIONS ASKED BY PLAINTIFFS IN ERROR WAS ERRONEOUS.

Plaintiffs in error asked two instructions which were refused by the court, and such refusal is made the basis of assignments of error numbers five and six. These assignments of error require no extended presentation, because it is practically conceded that the instructions contain correct statements of the law, and their refusal is justified on the ground that they are covered by the charge of the court. Whether or not they are so covered will be determined by a comparison of the refused instructions with those portions of the charge which deal with the same subject matter. We are not, of course, contending that the court was under any obligation to adopt our language, but we respectfully submit that there is nothing in the charge which covers the aspects of the case which we sought to have presented to the jury in the instructions asked for. While no objection was made to it, paragraph five of the charge of the court is not an accurate statement of our claim. It is as follows:

> "Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant, Charles Springer, to the effect that his compensation was not to be limited to the five hundred dollars originally fixed, but that he should go on with the litigation, see how it came out, and then Charles Springer would do what was right, *and after the property should be sold he would pay Jones a big cash fee.*" (*Transcript*, 96.)

That part of paragraph five "after the property should be sold he would pay Jones a big cash fee," was misleading to the jury, for two reasons. In the first place it was not the agreement which was sued on, and, in the second place, all conversations with reference to a big cash fee took place after all of the services had been rendered. The instruction asked for by us on this point, and refused by the court, was in strict conformity to the evidence. It was as follows:

"If the jury believe from the evidence that the plaintiff, A. A. Jones, agreed with the defendant, Charles Springer, to defend the case of the Maxwell Land Grant Company vs. John B. Dawson, for a fee of five hundred dollars, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any five hundred dollars; go on with the case and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case." (*Transcript*, 68.)

Of course the fact that no objection was taken to paragraph five does not preclude consideration of exceptions reserved to instructions refused. We think also that the instruction asked with reference to the preponderance of the evidence should have been givn. It is as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly." (*Transcript*, 68.)

This instruction appears to have been peculiarly applicable to this case as it was presented to the jury.

Thorwegan vs. King, 111 *U. S.*, 554.

Tryon vs. Pingree, 112 *Mich.*, 338.

Deserant vs. Cerrillos, etc. Co., 178 *U. S.*, 409.

Durant Min. Co. vs. Percy etc. Co., 93 *Fed. Rep.* 166.

V

Strenuous exception was made to the bill of exceptions in this case at the time it was signed by the trial judge, because it was supposed that a statute of New Mexico prescribed the only method of making up a bill of exceptions. So much of the statute as is material is as follows:

> "In all cases tried by the Court, either with or without the intervention of a jury, the testimony, all rulings of the court, objections made and exceptions taken on the trial, shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes, and when the stenographer shall have transcribed his notes, he shall file the same in the office of the clerk of the court, in which the action in which they were taken was tried, and thereupon either party to said cause desiring to have the same embodied in a bill of exceptions, may give ten days' notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried, to have the judge of said court sign and seal said notes in proper form as a bill of exceptions and may at the same time give notice of his intention to ask that any additional matters proper to be so incorporated, also be incorporated therein. Upon such notice, unless such transcript shall be shown to be incorrect, and in that case after correction, the judge, or his successor, shall settle, sign and seal the said transcript as a bill of exceptions, adding thereto such additional matters properly sought to be added. For the purpose of having said bill of exceptions signed and sealed, it shall not be necessary to make out a new copy of the notes of said stenographer, but the same may be referred to and identified as a part of the bill of exceptions; nor shall it be necessary to serve a copy thereof with the notice. If, for any reason, it shall be impracticable to use the transcript of the stenographer's notes taken upon any trial in the manner above provided for, for the purpose of settling bills of exception, bills of exception may be settled, signed and sealed in the same manner as they had formerly been, when no stenographer was used." (*Laws*, 1899, *p.* 168-169.)

The trial judge having signed the bill of exceptions, not-

withstanding this objection, a motion was made in the supreme court of the Territory to strike out the bill of exceptions for the same reason. That motion was not passed on formally, but the court considered the case as if the bill of exceptions were properly before it. It is apparent from the record and the certificate of the trial judge that nothing has been omitted from the bill of exceptions which could have been of the slightest value in the review of the case, although the volume of the record has been greatly diminished by making up the bill of exceptions in the form in which it is made. This court would not receive with patience, if it would tolerate at all, a bill of exceptions which contained a complete transcript of the stenographer's notes of such a trial as this, which would merely entail additional labor upon the court without effecting any useful purpose.

Pomeroy's Lessee vs. Bank, 1 *Wall.*, 599.
Hickman vs. Jones, 9 *Wall.*, 199.
Lees vs. U. S., 150 *U. S.*, 482.
Godkin vs. Monahan, 83 *Fed.*, 123.

Respectfully submitted,

NEILL B. FIELD,
Counsel for Plaintiffs in Error.